No. 85-1613

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE, INC. I, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether an attorney of the Antitrust Division of the Department of Justice who has properly had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing for and litigating a related civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Whether the district court acted within its discretion when it issued a Rule 6(e) order authorizing the Antitrust Division to disclose certain grand jury materials to attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act, a federal statute as to which the Civil Division has the primary enforcement responsibility.

PARTIES TO THE PROCEEDING

Respondents here include three corporations—John Does, Inc. I, II, and III, respectively—that are defendants in *United States* v. *"A" Corp.*, Civ. No. 85-2062 (S.D.N.Y.), filed under seal, and five individuals —John Does I, II, III, IV, and V, respectively—who are officers or employees of those corporations.*

* Because of the grand jury secrecy issues involved in this case, both the district court and the court of appeals ordered that the civil complaint filed by the government be kept under seal. J.A. 40-42; Pet. App. 2a, 20a.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 774 F.2d 34. The orders of the district court (Pet. App. 21a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1985. A petition for rehearing was denied on December 2, 1985 (Pet. App. 24a). On February 25, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including April 1, 1986. The petition was filed on March 31, 1986, and was granted on

May 27, 1986. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> Recording and Disclosure of Proceedings.
>
> * * * * *
>
> (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. * * *
>
> (3) Exceptions.
>
> (A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—
>
> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel * * * as are deemed necessary * * * to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.
>
> (B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury * * * with the names of the persons to whom such disclosure has been made * * *.
>
> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

STATEMENT

A. Background

1. In November 1981, the Agency for International Development (AID) of the Department of State notified the Antitrust Division of the Department of Justice that the conduct of certain American companies involved in AID-financed sales of tallow [1] to a foreign government might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq.* Attorneys from the Antitrust Division con-

[1] Tallow is used in the manufacture of soap, animal feed, and lubricants.

ducted an investigation from March 1982 through June 1984. In the course of that investigation, a grand jury in the Southern District of New York heard testimony from several dozen witnesses and reviewed approximately 250,000 pages of subpoenaed documents (Pet. App. 2a; J.A. 17-18).

Early in June 1984, the Antitrust Division tentatively concluded that the respondents and at least one other company had violated Section 1 of the Sherman Act, 15 U.S.C. 1, but also decided that a criminal prosecution was inappropriate. The grand jury investigation was therefore promptly terminated without an indictment being sought (J.A. 10, 18). At the same time, however, the Antitrust Division concluded that a civil action against the corporate respondents might be appropriate. Accordingly, the Assistant Attorney General in charge of the Antitrust Division instructed the attorneys who had conducted the grand jury investigation to consider a possible suit for injunctive relief under the Sherman Act [2] and damages under the False Claims Act, 31 U.S.C. (& Supp. II) 3729-3731 (Pet. App. 2a; J.A. 10, 16, 18).

Late in June 1984, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314, the government issued civil investigative demands (CIDs) for documents to nearly two dozen persons who had received grand jury subpoenas, including the corporate respondents here and approximately twenty other persons. The scope of the CIDs overlapped that of the earlier grand jury subpoenas, and the Antitrust Division notified the CID recipients that they could comply with the CIDs by certifying that they had

[2] The government may enforce the Sherman Act through both criminal prosecutions and civil suits. See 15 U.S.C. 1, 4, 15a.

produced all requested documents pursuant to the grand jury subpoenas. Nearly all of the CID recipients elected to comply in this manner. Two of the corporate respondents here, however, declined to certify that they had previously produced the sought-after documents, although they informally advised the Division that they had in fact done so. In the course of the civil investigation, the Antitrust Division attorneys also interviewed prospective witnesses and obtained documents from persons on a voluntary basis. Pet. App. 2a-3a; J.A. 16, 44.

2. The Antitrust Division ultimately concluded that the conduct at issue violated the Sherman Act and possibly the False Claims Act, and the Division considered bringing suit under both statutes. Although the Antitrust Division is authorized to prosecute False Claims Acts suits when the conduct in question also violates the antitrust laws (28 C.F.R. 0.40(a)), the primary responsibility for the enforcement of that statute rests with the Civil Division of the Department of Justice (28 C.F.R. 0.45(d)). Accordingly, the Antitrust Division determined that in order to ensure consistency in the government's enforcement of the False Claims Act, it should seek the advice of Civil Division attorneys as to the appropriateness of a False Claims Act suit on the facts of this case. The Antitrust Division also needed to consult with attorneys in the United States Attorney's Office for the Southern District of New York, where a civil suit would be filed. J.A. 11, 13, 14-15, 18.

The Antitrust and Civil Division attorneys entered into preliminary discussions that did not involve any disclosure of grand jury materials (Pet. App. 3a; see J.A. 19). These discussions proved insufficient,

however, because the Civil Division attorneys were unable fully to advise the Antitrust Division whether a False Claims Act suit would be appropriate without reviewing information compiled by the grand jury. Accordingly, to take advantage of the Civil Division's experience, the Antitrust Division attorneys deemed it necessary to disclose some grand jury materials to the Civil Division attorneys.

On November 30, 1984, the Antitrust Division sought an order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, from the United States District Court for the Southern District of New York authorizing the disclosure of information contained in the grand jury record to four named attorneys in the Civil Division, two named attorneys in the United States Attorney's Office, and their designees. The government informed the court that the proposed disclosure would "include[] a description and analysis of the evidence * * * uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury" (J.A. 12). The Division assured the court that the proposed disclosure was for consultation only and "not for purposes of further investigation" by the Civil Division or the United States Attorney (*id.* at 13). The government urged that the need for this limited disclosure to ensure consistent enforcement of federal civil law outweighed the need for continued secrecy (*id.* at 14-15).[3]

[3] As the government explained (J.A. 14-15):

> The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Division is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Division[']s expertise in enforcing cases under the False Claims Act.
>
> Coordination between the Civil Division[] and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts i[f] its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

3. Following an ex parte hearing, the district court granted the motion. The court entered a Rule 6(e) order permitting the Antitrust Division to disclose matters occurring before the grand jury to the six specified attorneys (and their designees) in the Civil Division and the United States Attorney's Office in order "to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order" (Pet. App. 23a).

In the following weeks, the Antitrust Division provided the specified attorneys with four memoranda that analyzed and quoted from documents and testimony presented to the grand jury. Some subpoenaed documents were attached to these memoranda. After analyzing this information and discussing it with attorneys from the Antitrust Division, the Civil Division attorneys advised the Antitrust Division that a

False Claims Act suit would be appropriate. Pet. App. 4a.

B. The Proceedings Below

1. The Antitrust Division ultimately decided to file a civil complaint. In March 1985, as a matter of courtesy, the Division notified the proposed defendants of the upcoming suit (J.A. 44-45). Respondents immediately moved in the district court to vacate the Rule 6(e) order. They also sought to prohibit the government from using any grand jury material in preparing, filing, or litigating the civil suit (Pet. App. 4a; J.A. 27-28). After a hearing,[4] the district court on March 12, 1985, denied the requested relief (Pet. App. 21a). The court stated that "[t]he entire impact of the papers [the government] submitted [at the hearing on the Rule 6(e) order was] to show there was a particularized need" and that government counsel "went through a great deal of trouble to indicate why they were necessary" (J.A. 34). The court also refused to enjoin the government from filing the complaint, or to disqualify the Antitrust Division attorneys who had participated in the grand jury investigation from participating in the civil suit (Pet. App. 21a).[5] Shortly thereafter, the United States filed a civil complaint under seal charging the corporate respondents and another company with (1) bid rigging and price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; (2) conspiring to defraud the United States in violation of the False Claims Act, 31 U.S.C. (& Supp. II) 3729-3731; (3) making false claims against the United States, in violation of Section 640A of the Foreign Assistance Act of 1961, 22 U.S.C. 2399b; and (4) unjust enrichment at common law.[6]

2. The court of appeals reversed (Pet. App. 1a-18a). The court ruled that the district court had abused its discretion in granting a Rule 6(e) order because the Antitrust Division had not demonstrated a particularized need for the disclosure of grand jury materials to the Civil Division. The court also held that the Antitrust Division attorneys who had access to grand jury materials during the criminal investigation must obtain a Rule 6(e) order before they

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[4] Respondents' motion was originally assigned to Judge Brieant. He denied the motion without prejudice on the ground that it should be presented to Judge Palmieri, who had issued the Rule 6(e) order (J.A. 29). After a hearing (J.A. 30-42), Judge Palmieri also denied respondent's motion (Pet. App. 21a), and it was his ruling that was later set aside by the court of appeals.

[5] The district court's denial of respondents' motion was "without prejudice to [its] renewal before the trial judge * * * assigned when [the] case is filed" (Pet. App. 21a).

[6] The complaint was filed under seal. After filing a notice of appeal, respondents moved in the court of appeals for a protective order prohibiting the government from using grand jury materials pending appeal in preparing for, filing, or litigating the proposed civil action and prohibiting the Antitrust Division from making any further disclosures to the Civil Division. The court of appeals refused to prohibit the United States from filing its complaint but directed that the complaint be filed under seal pending the resolution of respondents' appeal. Pet. App. 19a. As the court of appeals found, "the complaint filed by the government does not quote from or refer to any grand jury material" (*id.* at 17a). The court also prohibited the disclosure of grand jury material to anyone who was not already privy to the information (*id.* at 20a). See also page II note *, *supra*. A copy of the complaint, as reprinted in the supplemental appendix filed in the court of appeals, has been lodged under seal with the Clerk's Office.

themselves could use the same material in this civil suit.[7]

a. The court of appeals recognized that under *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the district court was " 'infused with substantial discretion' " in deciding whether to authorize disclosure (Pet. App. 6a (citation omitted)). It also acknowledged that the particularized need standard "is a highly flexible one" that accommodates considerations peculiar to the government " 'that weigh for or against disclosure in a given case' " (*id.* at 7a (citation omitted)). Nonetheless, the court of appeals concluded that the district court's order was improper because the Antitrust Division could eventually have provided the Civil Division with "substantially the same information" by exercising its discovery powers under the ACPA (*id.* at 9a). The Court recognized that this would require the investment of "a substantial amount of additional government time and effort," but it concluded that, under *Sells*, "such a factor can play no part in our analysis" (*id.* at 10a). Finally, despite the very narrow purpose for which disclosure was sought and permitted, the court of appeals stated that it was "influenced" in its assessment of the government's showing of particularized need (*ibid.*) by the fact that neither the government's request for disclosure nor the district court's Rule 6(e) order specified precisely what grand jury materials were to be disclosed (Pet. App. 11a). Accordingly, the court of appeals vacated the Rule 6(e) order.

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[7] The court of appeals rejected respondents' argument that the district court had erred by granting the order on the basis of an ex parte hearing pursuant to Fed. R. Crim. P. 6(e)(3)(D) (Pet. App. 5a-6a).

b. The court then turned to the question whether the Antitrust Division attorneys who had assisted the grand jury during its investigation could, in preparing for and litigating the contemplated civil suit, use grand jury materials to which they had previously had access without first obtaining a Rule 6(e) order (Pet. App. 11a-17a). The court recognized that the "issue presented here is more subtle" than the one decided in *Sells*, in which this Court "expressly left this question unresolved" (Pet. App. 11a-12a). The court of appeals stated that "[t]he threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—even constitutes 'disclosure' " for purposes of Rule 6(e) (Pet. App. 12a). The court acknowledged that it "seems fictional at first glance" to characterize as a "disclosure" an attorney's continued access during a civil suit to grand jury materials that he had reviewed during the grand jury's investigation (*ibid.*). But it concluded that this characterization was justified in this case because the sizeable volume of grand jury materials would invite the government attorneys to refresh their recollection by referring "repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar" (*ibid.*).

The court of appeals then discussed the reasons given in *Sells* for limiting access to grand jury materials. Pet. App. 13a-17a. The court recognized that one of these concerns—the threat to the integrity of the grand jury from its potential manipulation as a civil investigative device (see *Sells*, 463 U.S. 432-433)—was "largely absent" given the Antitrust Division's extensive discovery powers under the ACPA

(Pet. App. 13a-14a).[8] For the same reason, the court held that a second concern identified in *Sells*—that permitting use of grand jury materials in preparing civil litigation would subvert limitations on discovery power outside the grand jury setting (see 463 U.S. at 433)—had little force here (Pet. App. 14a-15a).

Nonetheless, the court of appeals concluded that the general secrecy concerns discussed in *Sells*—the risk of an illegal or inadvertent disclosure, and the risk that disclosure would inhibit the candor of grand jury witnesses (see 463 U.S. at 432)—did apply here (Pet. App. 15a-17a). The court said it was not seriously concerned about the "limited disclosure" resulting from the attorneys' continuing access to the grand jury materials (*id.* at 15a). But it noted that "support employees"—*i.e.*, paralegals and secretaries—would also presumably have access to grand jury materials, and that "any such disclosure, even if not in itself in violation of the statute, would increase the risk of inadvertent disclosure" (*id.* at 16a). The court also believed that allowing continued access under the circumstances of this case would cause grand jury witnesses to "be less willing to speak candidly before the grand jury" (*ibid.*). The court recognized that "[o]n balance * * * the threat of affirmative mischief * * * is somewhat less than * * * in *Sells*," and confessed that it was "tempted to conclude that the [government] need not seek a rule 6(e) order"

[8] Section 1312(a) (15 U.S.C.) provides that the Attorney General or Assistant Attorney General for the Antitrust Division may, before a civil complaint is filed, require any person to produce documentary materials, give written answers to interrogatories, provide oral testimony, or furnish any combination of the above, whenever he has reason to believe this information is relevant to a civil antitrust investigation.

in this case (Pet. App. 16a). Nevertheless, the court of appeals felt compelled to rule in respondents' favor because of "the reluctance imposed on us from above" (*id.* at 16a-17a), despite the "minimal * * * threat here" to grand jury secrecy (*id.* at 17a). The court therefore "prohibit[ed] any further access to or use of grand jury materials * * * unless and until" the government obtained a Rule 6(e) order (Pet. App. 17a).[9]

SUMMARY OF ARGUMENT

I. The first question in this case was expressly reserved in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 431 n.15 (1983): whether a Department of Justice attorney who participated in grand jury proceedings may make continued use of the grand jury materials in preparing and litigating an ensuing civil case without obtaining a Rule 6(e) order, so long as he does not disclose the materials to any other person.

The government and the public have a strong interest in an affirmative answer to this question. There are many cases in which, after a criminal investigation is completed, it is appropriate for the Department to consider civil proceedings in addition to or instead of criminal prosecution. Requiring the Department to duplicate the grand jury materials through civil discovery would impose a substantial additional burden on both the government and the interested private persons. Even more important, the resulting delay would force many civil cases in

[9] The court of appeals rejected respondents' claim that the mere filing of the government's civil complaint, which "does not quote from or refer to any grand jury materials," was itself an unauthorized "disclosure of grand jury material" (Pet. App. 17a).

the public interest to be dropped because of staleness or statutes of limitations.

By its plain terms, Rule 6(e) permits continued use of grand jury materials, in the civil phase of a dispute, by the attorneys who participated in the grand jury proceedings. Rule 6 expressly contemplates that certain categories of persons, including the participating government attorneys, will be privy to the grand jury proceedings and have access to the grand jury materials. Rule 6(e)(2) provides that such attorneys, and certain other persons, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule." Since an attorney's continued private use of materials to which he had prior lawful access is not a "disclosure," it is permitted by the plain meaning of the Rule.

The court of appeals, admitting that it "seems fictional" to do so (Pet. App. 12a), ruled that government attorneys' resort to grand jury materials "to refresh their recollection * * * is tantamount to a further disclosure" (*ibid.*). That ruling is contrary to the plain meaning of the word "disclose," which means "expose to view," not "reexamine." It is also, we respectfully submit, contrary to common sense: an attorney obviously may make "continued use" (for planning purposes and without further disclosure) of matters occurring before the grand jury that he is able to recall from memory; his equally private act of reviewing the same information in written form is no more a "disclosure" than his reliance on his memory.

The history of Rule 6(e) confirms its plain meaning. It has been the Department's longstanding practice, noted by this Court without criticism in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 678 (1958), to permit the attorneys who participated in grand jury proceedings to "us[e] the grand jury materials to prepare the [civil] case for trial." Although Rule 6(e) has been amended several times since 1958, there is not the slightest evidence that Congress believes that the Department's well known practice violates the Rule or threatens grand jury secrecy.

The court of appeals, after reviewing the policies underlying Rule 6(e), said "we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to litigate this civil action. But, however minimal the threat here, the reluctance imposed on us from above [in *Sells*] forces" the opposite result (Pet. App. 17a). The court was correct in its view that the threat is "minimal," but was incorrect in its reading of *Sells*.

There is, as the court of appeals recognized, no threat to secrecy from "continued access by those antitrust division attorneys who actually carried out the grand jury investigation here" (Pet. App. 15a). And while paralegal and secretarial personnel may handle such materials under the attorney's supervision, that is not a violation of the Rule, and the risk of disclosure by such a person (which would be punishable by contempt) is no greater than it would be if there were a criminal prosecution. Finally, the court of appeals correctly concluded that the policies, discussed at length by the Court in *Sells*, of protecting the integrity of the grand jury and preventing circumvention of limitations on civil discovery, have no bearing on this case, because of the Antitrust Division's extensive civil discovery powers. In view of

the absence of any incentive to abuse of the grand jury process where the only persons who may see grand jury materials are those who conducted the proceedings, and the ease with which any abuse can be remedied in a "continued use" case, we submit that these concerns have no bearing in other continued use cases either.

II. The second question presented in this case is whether the court of appeals correctly decided that the "substantial amount of additional government time and effort" required for duplicative civil discovery "can play no part in [the] analysis" of whether the government has shown a "particularized need" justifying a Rule 6(e) order. The effect of this ruling, also purportedly based on *Sells*, is to prevent the government from obtaining a Rule 6(e) order in *any* case in which grand jury materials are available from another source, however expensive it may be and however long it might take to obtain duplicate materials.

The court's holding was a misreading of *Sells*. This Court there rejected the argument that "saving time and expense" justifies dispensing entirely with the requirement of a Rule 6(e) order before disclosure to additional lawyers. 463 U.S. at 431. But nowhere did the Court suggest that time and expense "can play no part" in the district court's exercise of its "substantial discretion" to decide whether a Rule 6(e) order is appropriate in a particular case. On the contrary, *Sells* expressly endorsed the disclosure standard previously adopted in *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), which *Sells* described as "a highly flexible [standard], adaptable to different circumstances" (463 U.S. at 445).

The court's holding that no Rule 6(e) order may issue for materials obtainable, with whatever delay and expense, from other sources is also wholly illogical. The ruling would flatly prohibit use of grand jury materials on precisely those occasions when there is no reason whatever to do so, because neither the secrecy nor the integrity of the grand jury is at stake. Its only effect would be to impose a substantial additional burden on the enforcement of federal law in civil proceedings.

ARGUMENT

I. THE CONTINUED USE OF GRAND JURY MATERIALS, IN THE CIVIL PHASE OF A DISPUTE, BY A GOVERNMENT ATTORNEY WHO PARTICIPATED IN THE GRAND JURY PROCEEDINGS DOES NOT CONSTITUTE A "DISCLOSURE" OF MATTERS OCCURRING BEFORE THE GRAND JURY WITHIN THE MEANING OF FED. R. CRIM. P. 6(e)

A. Introduction

Many important federal statutes, including the Sherman Act, provide for both criminal prosecution and civil proceedings against violators.[10] In addition,

[10] Such statutes can be found in the following areas, for example: (1) false claims: civil, 31 U.S.C. (& Supp. II) 3729; criminal, 18 U.S.C. 287, 1001 *et seq.*; (2) antitrust laws: civil, 15 U.S.C. 9, 15a, 6; criminal, 15 U.S.C. 1, 2, 3, 8; (3) odometer tampering: civil, 15 U.S.C. 1990b; criminal, 15 U.S.C. 1990c; (4) hazardous substances: civil, 15 U.S.C. 1265; criminal, 15 U.S.C. 1264; (5) consumer credit: civil, 15 U.S.C. 1607; criminal, 15 U.S.C. 1611; (6) motor vehicle standards: civil, 15 U.S.C. 1398(a), 1415(c); criminal, 15 U.S.C. 1399(b); (7) adulterated foods, drugs, and cosmetics: civil, 21 U.S.C. 332; criminal, 21 U.S.C. 333; (8) fair housing laws: civil, 42 U.S.C. 3613; criminal, 42 U.S.C. 3631; (9) wage and hour laws: civil, 40 U.S.C. 328; criminal, 40 U.S.C. 332; (10) quarantine rules for ships: civil, 42 U.S.C. 271(b);

violations of criminal statutes often give rise to civil claims for damages owing to the government or to other victims. As a result, the Department of Justice must frequently decide, after a grand jury has completed its investigation of a possible crime, whether to bring a civil suit based on the same facts. The first question in this case is whether, when the same Department of Justice attorneys who participated in the grand jury proceedings are assigned to consider and prepare a civil case, they may continue to use the grand jury materials (without disclosing them to any additional persons) without a court order under Rule 6(e) of the Federal Rules of Criminal Procedure.

In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 18 (1983), the Court held that Rule 6(e) prohibits the disclosure of grand jury materials to Department of Justice attorneys who were *not* involved in the grand jury proceedings unless the government obtains a court order based on a showing of particularized need. The Court expressly declined to address "the continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal prosecution." 463 U.S. at 431 n.15.[11]

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criminal, 42 U.S.C. 271(a); (11) voting rights: civil, 42 U.S.C. 1973j(d) and (e); criminal, 42 U.S.C. 1973i, 1973j(a), (b) and (c); water pollution control: civil, 33 U.S.C. 1319(b) and (d); criminal, 33 U.S.C. 1319(c).

[11] Chief Justice Burger's dissent stated that "it is reasonable to read today's decision as allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case." 463 U.S. at 473.

In the present case, the court of appeals ruled that Antitrust Division attorneys who participated in grand jury proceedings and had lawful access to the grand jury materials may not review those materials in preparing a related civil case without a Rule 6(e) order. The court of appeals acknowledged that it was "tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to litigate this civil action" (Pet. App. 16a-17a). But the court concluded, citing *Sells*, that "the reluctance imposed on us from above" (Pet. App. 17a) forced it to deny the Antitrust Division such continued use. This ruling, we respectfully submit, misreads both Rule 6(e) and the policy of secrecy, articulated in *Sells*, that underlies the rule.[12]

Rule 6(e) does not, by its plain terms, prohibit continued use of grand jury materials, in the civil phase of a dispute, by government attorneys who have had prior lawful access to them, so long as they make no disclosure to other persons. Rule 6(e) expressly contemplates that certain categories of persons, including the government attorneys participating in the proceedings, will be privy to the grand jury materials. Its "General Rule of Secrecy" prohibits disclosure of matters occurring before the grand jury *by*

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[12] The court also held, again citing *Sells*, that the "substantial amount of additional government time and effort" required to duplicate grand jury materials through civil discovery "can play no part" (Pet. App. 10a) in the analysis of whether the government has made the showing of "particularized need" required to obtain a Rule 6(e) order. This second holding is discussed below at Point II. The two rulings would together make it impossible to make any continued use of the grand jury materials in any case where the materials are available (with whatever delay and at whatever cost) from any other source.

those persons to *other* persons. No such disclosure occurs when an attorney for the government who has participated in the grand jury proceedings, and has had access to the grand jury materials, continues to use them in the investigation and litigation of a civil claim. Such continued use of the materials, without further disclosure, does not enlarge the number of people "inside the circle" or otherwise threaten grand jury secrecy.

On the other hand, the government and the public have a strong interest in the government's being able to make continued use of grand jury materials in the civil phase of a dispute when the government can do so without additional disclosure. The expense (not only to the government and the taxpayers but also to other parties and witnesses) of duplicating a grand jury investigation through civil discovery (or other available means) would often be enormous.[13] The lapse of time, if the government were required to duplicate a completed grand jury investigation through civil discovery, would mean that both sides face unnecessarily prolonged uncertainty and that many important cases in the public interest would not be brought at all, because of problems of staleness and statutes of limitations.[14] And if the attorneys who participated in the grand jury proceedings were not permitted to use the grand jury materials in the civil phase of a dispute, in many cases those attor-

[13] In this case, for example, the grand jury heard testimony from dozens of witnesses and obtained approximately 250,000 pages of documents before the decision was made not to seek an indictment. Pet. App. 2a.

[14] See Pet. App. 17a (noting that the statute of limitations apparently barred prosecution of one of the government's civil claims).

neys could not, as a practical matter, participate in the civil phase at all, because they would be vulnerable to challenges (brought in good faith or otherwise) alleging their improper reliance on grand jury materials.[15]

[15] Indeed, the question of such total disqualification was touched on below. The court of appeals said (Pet. App. 17a): "Since it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts learned during the grand jury investigation, we think that the real question [not presented here] is whether the prosecutor must be disqualified from litigating the civil case. Since appellants have expressly declined to present that issue, we are not called upon to address it." In *United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d 206 (8th Cir. 1986), petition for cert. pending, No. 85-1840, the court addressed that question and held, "[w]e do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered disclosure" within the meaning of Rule 6(e). 785 F.2d at 212.

There are, we suggest, four points: (1) Any ruling disqualifying prosecutors from participating in related civil cases would impose a severe burden on enforcement efforts, particularly in Divisions and Offices of the Department that are small or are organized by subject matter. (2) Reliance by an attorney on his recollection of matters occurring before the grand jury simply is not "disclosure" (unless he discloses his recollection to another person) and therefore is not prohibited by Rule 6(e) under any plausible reading. (3) If an attorney may rely on his recollection of matters occurring before the grand jury, then no purpose is served by preventing him from reviewing grand jury materials (in private and without disclosure to any other person), and of course such review does not fall within the plain meaning of "disclosure." (4) Conversely, if any attorney who has had access to grand jury materials is not permitted to review them in preparing a civil case, the government may in many cases be well advised not to use him, lest repeated challenges to his sources of informa-

The Antitrust Division, the Civil Division, and many United States Attorney's offices often use the same attorneys in successive, related criminal and civil matters. This practice is common, for example, in the Antitrust Division, because line attorneys are assigned to sections that are responsible for specific industry groups.[16] The Civil Division also has enforcement responsibilities with respect to conduct that may be prosecuted in either a criminal or civil action, and the same attorneys are, whenever possible, assigned to work on successive related matters. Smaller United States Attorneys offices follow this practice as a matter of necessity, because there are simply not enough attorneys to permit double staffing. The major changes in the government's longstanding practice that would be required under the court of appeals' decision are both unnecessary and unwise.

B. The Plain Text Of The Rule

The starting point in construing a federal rule of procedure, like the starting point in construing a statute, is the language employed by Congress. See *Schiavone* v. *Fortune*, No. 84-1839 (June 18, 1986), slip op. 9 (Fed. R. Civ. P. 15(c)); see also *Sedima, S.P.R.L.* v. *Imrex Co.*, No. 84-648 (July 1, 1985), slip op. 8; *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). As the Court stated in *Schiavone*, "[w]e do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a

tion (which may be hard to put out of court when the attorney has been thinking, conversing, making notes, and collecting files about the same set of events over a long period of time) delay and obstruct the civil proceedings.

[16] U.S. Dep't of Justice, *Antitrust Division Manual* I-22-23 (rev. 1982); see also J.A. 17.

'technical' interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says." Slip op. 9.

Rule 6(e) plainly does not prohibit continued use of grand jury materials, without disclosure, by government attorneys who participated in the grand jury proceedings and had lawful access to those materials in that capacity. The Rule contemplates that certain persons, including participating government attorneys, may have access to grand jury materials.[17] The "General Rule of Secrecy" in Rule 6(e)(2) then provides that specified persons, including such attorneys, "shall not disclose matters occurring before the grand jury * * *." The following sentence states that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." By its terms, therefore, Rule 6(e) prohibits only "disclosure" of matters occurring before the grand jury; it does not forbid the continued use of grand jury materials by government attorneys who do not disclose them to others.

The court of appeals, admitting that it "seems fictional at first glance" (Pet. App. 12a), held that the attorneys' review of materials constitutes a "disclosure." That ruling is contrary to this Court's instruction to assume that "the ordinary meaning of the language that Congress employed 'accurately ex-

[17] Under Rule 6(d), only the attorneys for the government, the witness under examination, the stenographer or operator of a recording device, and, when necessary, interpreters are permitted to be present while the grand jury is in session. Rule 6(d) forbids anyone other than the grand jurors themselves from attending the grand jury's deliberations or vote.

presses the legislative purpose.'" *Mills Music, Inc.* v. *Snyder*, No. 83-1153 (Jan. 8, 1985), slip op. 10 (citation and footnote omitted); see also *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). The ordinary meaning of "disclosure" does not include review of materials by persons who have had prior access to them. The word "disclose," which is not defined in the Rule, means "to open up[,] to expose to view[,] * * * [to] open up to general knowledge" (*Webster's Third New International Dictionary* 645 (1976)), and "to make known or public * * * something previously held close or secret" (*Webster's New Collegiate Dictionary* 325 (1975)). As the Eighth Circuit recently explained, "[f]or there to be a disclosure [under Rule 6(e)], grand jury matters must be disclosed to *someone*" (*United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d 206, 212 (8th Cir. 1986) (emphasis in original), petition for cert. pending, No. 85-1840). When a government attorney has participated in grand jury proceedings and has therefore had lawful prior access to the grand jury materials, his continued use of them does not constitute a "disclosure" within the ordinary meaning of that term, because the materials are not opened up to the view of any additional individual.[18] Nothing is made "known or public" that was "previously held close or secret."

[18] The initial grant of access to the grand jury materials to the attorney participating in the grand jury proceedings *is* a disclosure within the meaning of Rule 6(e) and is authorized by paragraph (3)(A)(i) of the Rule. As the Court noted in *Sells*, such access is properly granted not only to "those prosecutors who actually *did* appear before the grand jury," but also to "anyone working on a given prosecution [because each such person] would clearly be *eligible* under Rule 6(d) to enter the grand jury room, even if particular individuals did not have occasion to do so." 463 U.S. at 429 n.11 (emphasis in original). Thus, disclosure—the affording of access—has been made to any attorney who was part of "the *prosecution* team" (*Sells*, 463 U.S. at 429 n.11 (emphasis in original)).

The court of appeals reasoned, however, that, because the quantity of grand jury materials in this case was too great for any person to commit to memory, the attorneys preparing the civil suit would need to refer to at least some of these materials. The court then ruled that "any resort to these materials by the attorneys * * * to refresh their recollection * * * is tantamount to a further disclosure" (Pet. App. 12a).[19]

But "disclosure" is the act of exposing materials to view, not the act of viewing. The Antitrust Divi-

[19] The only support the court of appeals cited for its conclusion that continued access amounted to disclosure was the statement in the Ninth Circuit's opinion in *Sells* that "'[e]ach day this order remains effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.'" Pet. App. 12a-13a (asterisks in original) (quoting *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1188 (9th Cir. 1981), aff'd, 463 U.S. 418 (1983)). But the Ninth Circuit was making an entirely different, and irrelevant, point. In *Sells*, the government attorneys who handled the grand jury investigation physically handed over grand jury materials to Civil Division attorneys who had not appeared before the grand jury. The passage quoted above simply responded to the government's mootness argument (which was based on the fact that the transfer of materials had already occurred) by pointing out that, to the extent that attorneys who had not appeared before the grand jury continued to review materials with which they were unfamiliar, "the veil of secrecy is lifted higher." The Ninth Circuit's words ("have already been disclosed") correctly treat the disclosure as having occurred when the materials were made available to the Civil Division, not when they were read sometime later.

sion attorneys involved in this civil suit participated in the grand jury proceedings and were given access at that time to the grand jury materials. The grand jury materials were therefore "disclosed" to these attorneys when they participated in the grand jury's proceedings.[20] Their continued use of these materials does not involve a "disclosure" unless they reveal them to someone else. Otherwise, nothing "is made known or public * * * [that was] previously held close or secret" because the government attorney was already a party to the secret.

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[20] The basis of a government attorney's right to continue to use documents in civil proceedings is, of course, his prior lawful access to *those documents* under paragraph (3)(A)(i) of Rule 6(e). We do not mean to suggest that mere knowledge of information contained in a document entitles anyone to obtain the document itself without a Rule 6(e) order. The clearest example of this point is the well settled rule that a witness is not entitled to a copy of his grand jury testimony on demand, even though he obviously was present in the grand jury room during the receipt of evidence, since a rule of automatic access would expose grand jury witnesses to potential intimidation. See *Executive Securities Corp.* v. *Doe*, 702 F.2d 406, 408-409 (2d Cir.), cert. denied, 464 U.S. 818 (1983); *United States* v. *Clavey*, 565 F.2d 111, 114 (7th Cir. 1977), vacated, 578 F.2d 1219 (1978) (en banc), cert. denied, 439 U.S. 954 (1979); *In re Bianchi*, 542 F.2d 98, 100 (1st Cir. 1976); *Bast* v. *United States*, 542 F.2d 893, 896 (4th Cir. 1976); *United States* v. *Fitch*, 472 F.2d 548, 549 & n.6 (9th Cir.), cert. denied, 412 U.S. 954 (1973); *In re Bottari*, 453 F.2d 370, 371 (1st Cir. 1972); *Valenti* v. *United States Department of Justice*, 503 F. Supp. 230, 233-234 (E.D. La. 1980); *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282 (S.D. Fla. 1974); *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972); *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 106, at 247 (2d ed. 1982). Contra, *In re Minkoff*, 349 F. Supp. 154 (D.R.I. 1972); *In re Russo*, 53 F.R.D. 564, 568-573 (C.D. Cal. 1971).

Nor does it make sense to treat an attorney's review of materials previously disclosed to him as a "disclosure." Obviously, an attorney can make "continued use" of any information that he learned and committed to memory while participating in grand jury proceedings, because his later recollection does not involve a further "disclosure."[21] It would make no sense to treat his equally private act of reviewing the same information in written form as a "disclosure."

Rule 6 implements the principle that grand jury proceedings should remain secret in two related ways. First, Rule 6(d) identifies and limits the persons who may be present before the grand jury while it is in session. Second, Rule 6(e)(2) prohibits those persons (except witnesses) and some others from disclosing "matters occurring before the grand jury." The text of Rule 6 thus indicates that secrecy is breached when a disclosure of matters occurring before the grand jury is made to a person who did not have lawful access to the grand jury proceedings. That is not what is involved here. The government attorneys who participated in the grand jury investigation were in the grand jury room and were also aware of the "matters" that occurred before the grand jury. Their subsequent review of grand jury documents and testimony therefore does not expand the scope of their initial, lawful use of grand jury materials and thus does not breach the secrecy concerns underlying Rule 6(e).

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[21] See *United States* v. *Archer-Daniels-Midland Co.*, 785 F.2d at 212: "We do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered [a] disclosure" within the meaning of Rule 6(e).

C. The History Of Rule 6(e)

Given the clear meaning of the term "disclosure" in Rule 6(e), only the most extraordinary showing of a contrary legislative intent would justify departing from the "plain meaning" of that term. See *United States* v. *James*, No. 85-434 (July 2, 1986), slip op. 8; *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980). The history of Rule 6(e), however, does not contradict the import of its plain language.

It has been the longstanding position of the Department of Justice that if a grand jury investigation is closed, the attorneys who participated in the grand jury proceedings may, without obtaining a court order, review grand jury materials, to which they have had prior access, when they consider and prepare a subsequent civil suit.[22] This Court's awareness of the government's practice was clearly reflected in its opinion in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), in which the Court noted, without criticism, that "the Government is using the grand jury transcript to prepare the case for trial." *Id.* at 678.[23] Since *Procter & Gamble*, the Rule has been repeatedly amended without any indication of congressional disagreement with the Department's practice. Neither the advisory committee notes to the subsequent amendments to Rule 6(e)[24] nor the legislative history of the 1977 congressional revisions of the Rule[25] indicates any congressional perception that the Department's practice threatens grand jury secrecy or otherwise violates Rule 6(e).

[22] See *Sells*, 463 U.S. at 455-460 (Burger, C.J., dissenting).

[23] In *Procter & Gamble*, the Court held that the defendants in a civil antitrust suit brought by the government must demonstrate a particularized need to obtain grand jury material for use in the suit. The Court also ruled that the government may not initiate grand jury proceedings solely for the purpose of advancing a civil investigation. 356 U.S. at 683-684. The Court did not, however, disapprove the government's civil use of grand jury materials where the grand jury was used "for strictly criminal purposes" (*Sells*, 463 U.S. at 434 n.19). See *Procter & Gamble*, 356 U.S. at 683-684.

D. The Policies Underlying Rule 6(e)

The court of appeals reviewed the policy considerations underlying this Court's decision in *Sells*. Its overall conclusion was that "we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material to liitgate this civil action. But, however minimal the threat here, * * * the reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy" (Pet. App. 16a-17a). A review of the policy considerations demonstrates, however, that the threat posed by continued use of grand jury materials, in the civil phase of a dispute, by an attorney who participated in the grand jury proceedings is indeed

[24] See Notes of Advisory Committee on Rules (1966 Amendment), 18 U.S.C. App. at 568, Notes of Advisory Committee on Rules (1977 Amendment), 18 U.S.C. App. at 569; Notes of Advisory Committee on Rules (1979 Amendment), 18 U.S.C. App. at 570-572; Notes of Advisory Committee (1983 Amendment), 18 U.S.C. (Supp. I) App. at 446-448; Notes of Advisory Committee (1985 Amendment), 18 U.S.C.A. Rule 6, at 79-80 (West 1986).

[25] See S. Rep. 95-354, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-195, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 11108-11112 (1977) (House debate); *id.* at 24641-24642 (Senate debate); *id.* at 25193-25196 (House debate on Senate amendments).

"minimal," and certainly is not sufficient to overcome the plain meaning of the rule and the importance of such continued use to the effective enforcement of federal law in cases with both criminal and civil phases.

1. *Secrecy*

The most important purpose of Rule 6(e) is, of course, to preserve the secrecy of grand jury proceedings themselves. The Court has often recognized that Rule 6(e) codifies an important, deeply-rooted policy, stemming from the common law, that grand jury proceedings should remain secret in order to enable the grand jury to perform its integral role in the criminal process. See *Sells*, 463 U.S. at 423-425; *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557, 566-567 n.11, 572-573 (1983); *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 & n.9, 222 (1979); *United States* v. *Procter & Gamble Co.*, 356 U.S. at 681-682 & n.6 (quoting *United States* v. *Rose*, 215 F.2d 617, 628-629 (3d Cir. 1954)). Many of the most important reasons for maintaining grand jury secrecy are no longer applicable when (as in any case presenting this question) the grand jury proceedings are over and the dispute is in its "civil phase," and when it is the government, rather than a private party, that seeks access to the materials.[26] But secrecy remains the primary purpose of the Rule.

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[26] In such cases, there is no reason to fear that disclosure will hamper the operation of the grand jury, allow a suspect to flee, or facilitate tampering with grand jury witnesses or with the grand jurors themselves. Witnesses will also have no reason to fear that they will be subject to intimidation or retaliation because of their testimony before the grand jury. See *Abbott*, 460 U.S. at 566-567 n.11; *Douglas Oil*, 441 U.S. at 222; 8 J. Wigmore, *Evidence in Trials at Common Law* § 2360, at 734-735 (McNaughton rev. ed. 1961); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 106, at 244 (2d ed. 1982); see also *Dennis* v. *United States*, 384 U.S. 855, 872 n.19 (1966); cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-234 (1940).

The court of appeals was, appropriately, unconcerned about continued use of grand jury materials by the government attorneys themselves: "[i]f it only involved continued access by those antitrust division attorneys who actually carried out the grand jury investigation here, then the disclosure would admittedly be limited" (Pet. App. 15a). Since such continued use involves *no* increase in the number of persons with access to the materials, even this modest statement exaggerates the threat. The court of appeals was, however, concerned about the risk of an illegal or inadvertent disclosure of grand jury materials by paralegal and clerical support personnel assisting the Antitrust Division's attorneys in handling such materials (*id.* at 15a-16a). The court said that allowing such personnel to handle grand jury materials would substantially increase the risk of an illegal or inadvertent disclosure to others (*id.* at 16a).[27]

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[27] The court of appeals also believed that under Rule 6(e)(3)(A)(ii) such support personnel could not handle grand jury materials in connection with a civil case without a Rule 6(e) order. If the court of appeals were correct, the role of support personnel would provide no argument whatever for denying continued use by attorneys: support personnel could not handle grand jury materials unless authorized by a court order. We believe, however, that a paralegal or secretary may handle materials that have been disclosed to the supervising attorney, under his or her supervision, without a court order, and that paragraph (3)(A)(ii), added in 1977, addresses quite a different problem.

Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by Rule 6(e) may be made to "such government

But the court's speculation about additional risk of disclosure by paralegal or clerical personnel is unfounded. If, as will presumably be the case, the paralegal or secretary worked with the attorney in the grand jury proceedings, no disclosure to any new person occurs when he or she continues to assist in a later civil investigation. The risk of disclosure *by* such a paralegal or secretary (which would be punishable as contempt) is no greater than it would be if there were a criminal prosecution, where such support personnel are permitted to continue to handle grand jury materials to which the supervising attorney has access. And the possibility of an occasional change in the identity of such personnel does not materially change the practical risk. In the anal-

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personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." See page 2, *supra*. As this Court noted in *Sells*, this amendment was necessary "because Justice Department attorneys found that they often needed advice from *outside* personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills." 463 U.S. at 436 (emphasis added). The advisory committee notes and congressional reports to Rule 6(e)(3)(A)(ii) show that it was adopted to permit attorneys to reveal grand jury materials to assistants such as auditors, investigators, or attorneys from federal agencies. See 18 U.S.C. App. at 566, 569-570; S. Rep. 95-354, *supra*, at 6-7; H.R. Rep. 95-195, *supra*, at 3-4. There is no hint in the legislative history that this subsection of the Rule was necessary or designed to allow secretaries, paralegals, or similar support personnel to handle grand jury materials. The court of appeals therefore erred in concluding that the disclosure of grand jury materials *to* such persons would violate Rule 6(e)(3)(A)(ii).

ogous situation of the attorney-client privilege, a lawyer's secretary and support staff are universally (and sensibly) viewed as a necessary extension of the attorney, and the communication of a client's confidences to such persons therefore does not destroy the privilege.[28] The need of attorneys to rely on secretarial and paralegal support should not have caused the court of appeals to abandon the sensible rule that an attorney to whom materials have been disclosed may continue to use them in the civil phase of the dispute.

The court of appeals also mentioned briefly the risk that the possibility of use of grand jury materials by the same government attorneys in civil litigation might have a chilling effect on the willingness of grand jury witnesses to testify candidly (Pet. App. 16a; see *Sells*, 463 U.S. at 432). That risk, however, seems negligible: a witness not "chilled" by the risk that his testimony might be disclosed under the Jencks Act, 18 U.S.C. 3500,[29] or a Rule 6(e) order, or the risk that a prosecutor with a good memory could rely on his recollection of that testimony in

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[28] See, *e.g.*, *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 40 (D. Md. 1974); *Zenith Radio Corp.* v. *RCA*, 121 F. Supp. 792, 794 (D. Del. 1954); *People* v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220 (1983); *Taylor* v. *Taylor*, 179 Ga. 691, 177 S.E. 582 (1934); *State* v. *Krich*, 123 N.J.L. 519, 9 A.2d 803 (1939); 2 D. Louisell & C. Mueller, *Federal-Evidence* § 209, at 754 (1985); C. McCormick, *Evidence* § 91, at 218 (3d ed. 1984); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503(a)(3)[01], at 503-524 (1985); 8 J. Wigmore, *supra*, § 2301, at 583.

[29] The Jencks Act allows disclosure of the testimony of witnesses before the grand jury to criminal defendants for use at trial.

preparing a later civil suit, or the risk that the same testimony could be compelled under the Antitrust Civil Process Act, 15 U.S.C. 1311-1314, is unlikely to be chilled by the modest additional risk that the same attorneys may continue to use grand jury materials in the civil phase of a dispute. We recognize that, in *Sells*, the Court gave some weight to the possible chilling effect of this additional use of the material;[30] we respectfully suggest that any slight additional risk of chill that may be present in a "continued use" case, where the civil use may only be made by the same attorneys, simply cannot outweigh the benefits to the enforcement of federal law in civil proceedings.

Grand jury secrecy is undeniably important, but its importance does not justify extending the reach of Rule 6(e) beyond what Congress intended merely to "reinforce" (Pet. App. 17a) the purposes that the Rule serves. As this Court recently noted, the "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address." *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 12. *Sells* was not a mandate to expand the scope of Rule 6(e) to reinforce in some unspecified way the principle of grand jury secrecy. This Court has never "exalt[ed] the principle of secrecy for secrecy's sake" in grand jury cases (*Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 407 (1959) (Brennan, J., dissenting)). Continuing access by a limited number of

[30] See 463 U.S. at 432 (noting that if automatic disclosure were allowed, grand jury testimony would be "routinely available" for use in civil suits, thus "render[ing] considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly").

attorneys who assisted a grand jury in its investigation presents no serious threat to the interests safeguarded by grand jury secrecy. In stating that the "reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy" (Pet. App. 17a) by requiring the Antitrust Division attorneys in this case to obtain a Rule 6(e) order, the court of appeals misread *Sells* and exalted the principle of secrecy for secrecy's sake.

2. *Integrity of the grand jury*

In *Sells*, this Court also identified as policy concerns underlying Rule 6(e) the need to protect the integrity of the grand jury against misuse as a civil investigative device and the need to prevent circumvention of limitations on civil discovery. See 463 U.S. at 432-434. The court of appeals found that those considerations were inapplicable in this case, saying "we do not view either of the last two problems in *Sells* as reasons to require a Rule 6(e) order here." This ruling was correct.

The premise for allowing the attorneys who participated in grand jury proceedings to continue to use grand jury materials in the civil phase of a dispute is, of course, that the grand jury was convened and used solely for bona fide criminal investigative purposes. No one questions the bona fides of the grand jury investigation in this case.

As the court of appeals recognized (see Pet. App. 9a), the Antitrust Division has extensive precomplaint discovery powers under the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314. See *Associated Container Transp. (Australia), Ltd.* v. *United States*, 705 F.2d 53 (2d Cir. 1983). These powers eliminate any need, and therefore any incen-

tive, to abuse the grand jury process to generate evidence for a civil suit. The ACPA empowers the Antitrust Division, before a civil complaint is filed, to demand documentary evidence (15 U.S.C. 1312(b)(2)), answers to written interrogatories (15 U.S.C. 1312 (b)(3)), or oral testimony (15 U.S.C. 1312(b)(4)), of "any person" who may "have any information[] relevant to a civil antitrust investigation" (15 U.S.C. 1312(a)). The statute provides for nationwide service of process (15 U.S.C. 1312(d)(2)), and recalcitrant witnesses may be compelled to testify (15 U.S.C. 1312(i)(7)(B)). Conducting a grand jury investigation, in our experience, involves considerably more effort and expense than civil discovery under the ACPA. The court of appeals was therefore correct in concluding that the Antitrust Division would "gain little by instigating a grand jury investigation for the purpose of gathering evidence for a civil proceeding, when it could gather that same information" under the ACPA (Pet. App. 14a).

Even in cases not involving the Antitrust Division there is no reason to fear abuse of the grand jury process.[31] In a "continuing use" case, the fear expressed in *Sells* (463 U.S. at 431-432) that one set of attorneys might use the grand jury to compile "a storehouse of evidence" so that their "colleagues would be free to use the materials generated * * * for a civil cause," simply does not apply. The attorneys participating in the grand proceedings have no such incentive because any future civil use is limited to refreshing their own memories (without disclosure) if they happen to be assigned to the civil case.

[31] The Court said in *Sells*, 463 U.S. at 432, "[w]e do not mean to impugn the professional characters of Justice Department lawyers in general."

If the same attorneys do conduct the civil case they can be held responsible for their own good faith in conducting the prior grand jury proceedings. And if there is a basis for challenge to the bona fides of the grand jury proceedings, the attorneys responsible for those proceedings are, by hypothesis, immediately available to be called on to respond in the civil case.[32]

[32] The question may be asked why Rule 6(e) orders should be dispensed with in "continued use" cases rather than merely granted, after hearing, under a standard that takes appropriate account of the burdens of duplicative discovery. There are four answers. First, of course, the plain meaning of Rule 6(e) simply does not require a Rule 6(e) order in these circumstances. Second, the requirement of a Rule 6(e) order not only imposes a substantial burden of time and effort but also (because a case frequently cannot proceed at all until the matter is resolved) affords defendants the means to impose repeated lengthy delays by litigating the correctness of Rule 6(e) orders that are granted and the need for Rule 6(e) orders that are not sought; the present case, which has been delayed more than a year by this litigation, is an excellent example. (It should be noted that although the Second Circuit held in this case that Rule 6(e) hearings can be conducted ex parte, other courts have said that ex parte proceedings are disfavored: see *In re Doe*, 537 F. Supp. 1038, 1042 (D.R.I. 1982).) Third, even if this court were to articulate an appropriate standard, lower courts will of course debate, disagree, and sometimes err in applying that standard, effectively denying continued use in cases where it should be permitted. Fourth, and perhaps most important, there is no function for the Rule 6(e) hearing to perform: the question whether it is appropriate for attorneys who have conducted grand jury proceedings to be permitted to review grand jury materials (without disclosure) in preparing and litigating a related civil case is one that demands a general answer, provided by this Court.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY AUTHORIZING THE DISCLOSURE OF GRAND JURY MATERIALS FOR THE LIMITED PURPOSE OF ENSURING CONSISTENT ENFORCEMENT OF FEDERAL LAW

The court of appeals held that the district court's Rule 6(e) order, which permitted the Antitrust Division to disclose grand jury materials to specified attorneys in the Civil Division and United States Attorney's office for limited consultative purposes, should be vacated because the Antitrust Division had not shown a sufficient "particularized need." The court of appeals accepted the Antitrust Division's need to consult and to provide detailed information in order to do so (Pet. App. 9a), but it ruled that the Antitrust Division did not "need" to use grand jury materials, because it has broad precomplaint discovery powers under the ACPA, 15 U.S.C. 1311-1314. The court acknowledged that "a substantial amount of additional government time and effort may be required" (Pet. App. 10a) for this duplicative discovery, but it ruled that, under *Sells*, "such a factor can play no part in our analysis" (*ibid.*). In sum, the court ruled that whenever the government *can* duplicate grand jury materials through civil discovery or some other means, it may not obtain a Rule 6(e) order. The court thus denied continued use of grand jury materials in precisely those cases where there is no reason whatever to do so.

The district court properly exercised its "substantial discretion" (*Douglas Oil*, 441 U.S. at 223) in granting the Antitrust Division's Rule 6(e) motion.[33]

[33] Rule 6(e)(3)(C)(i) authorizes disclosure of grand jury material "preliminarily to or in connection with a judicial proceeding" upon a showing of particularized need. See

It permitted the Antitrust Division to make disclosure solely for the purpose of obtaining the advice of the Civil Division and the United States Attorney in order to ensure consistent government enforcement of the False Claims Act. Ensuring consistency in the enforcement of federal law is surely a legitimate purpose, as well as a "relevant consideration[], peculiar to [the] Government * * * that weigh[s] for * * * disclosure" (*Sells*, 463 U.S. at 445). See *Abbott*, 460 U.S. at 567-568 n.15. The court of appeals did not question the government's showing that the Civil Division could not offer the Antitrust Division meaningful advice without first examining some of the grand jury materials.[34] Accordingly, disclosure for this limited purpose clearly served "the ends of justice" (*Socony-Vacuum Oil Co.*, 310 U.S. at 234).

The limited disclosure allowed by the district court's Rule 6(e) order also posed no material threat to any of the interests that Rule 6(e) is meant to protect. The grand jury proceedings had been terminated, and the interests relevant to the protection of an ongoing investigation, the court of appeals recognized, were therefore irrelevant (Pet. App. 7a). The court also recognized that limited purpose disclosure to the attorneys in the Civil Division and the United States

Abbott, 460 U.S. at 567 n.14 (disclosure appropriate where it is necessary to avoid a possible injustice in another judicial proceeding, need for disclosure outweighs the need for continued secrecy, and request is structured to cover only material needed); *Douglas Oil*, 441 U.S. at 222 (same).

[34] As explained above (pages 5-6), the Antitrust Division sought the authority to disclose grand jury materials to the Civil Division only after its discussions with the Civil Division not involving the use of grand jury materials had proved fruitless. See Pet. App. 3a.

Attorney's Office posed relatively little "risk of further leakage or improper use" of the materials (*ibid.* (quoting *Sells*, 463 U.S. at 445)). In particular, providing Civil Division attorneys with grand jury materials under a Rule 6(e) order involves no greater risk of subsequent inadvertent or illegal disclosure than providing the same attorneys with the same materials obtained under the ACPA. Indeed, while the attorneys who receive such materials are required to keep them confidential in either case (compare Rule 6(e)(2) with 15 U.S.C. 1313(c)(4)), there may well be less risk of inadvertent or illegal disclosure of grand jury information than of information gathered under the ACPA, since violation of a Rule 6(e) order would be punishable as contempt of court. And the court of appeals agreed that the disclosure would save the government the substantial time and expense it would incur if it had to recreate the materials, particularly the grand jury testimony, through the ACPA (Pet. App. 8a). For all these reasons, the Antitrust Division clearly demonstrated that "the need for disclosure [was] greater than the need for continued secrecy" (*Douglas Oil*, 441 U.S. at 222).

The court of appeals ruled, however, that in view of the Antitrust Division's civil discovery powers it did not "need" to disclose the grand jury materials. Pet. App. 9a-10a. It recognized the "substantial amount of additional government time and effort" involved in duplicating the materials, but ruled that "such a factor can play no part" in a district court's decision whether to authorize the disclosure of grand jury materials (Pet. App. 10a, citing *Sells*, 463 U.S. at 431). That conclusion, however, seriously misreads this Court's decision in *Sells*.

In *Sells*, the Court rejected a construction of Rule 6(e) that would have permitted the disclosure of grand jury materials without a Rule 6(e) order to any Department of Justice attorney for use in preparing a civil suit. The Court said that "saving time and expense" did not justify dispensing with the requirement of a Rule 6(e) order. 463 U.S. at 431. But nowhere in *Sells* did the Court suggest that the saving of time and expense "can play no part" (Pet. App. 10a) in a district court's analysis of whether a Rule 6(e) order is appropriate in a particular case. On the contrary, *Sells* expressly endorsed the disclosure standard previously adopted in *Douglas Oil* (463 U.S. at 443-444), which *Sells* described as "a highly flexible [standard], adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than in others" (*id.* at 445). See *Douglas Oil*, 441 U.S. at 223. Neither *Sells* nor *Douglas Oil* requires the government to waste its resources in duplicative discovery when the purpose of disclosure is manifestly legitimate, there is no risk to secrecy, and there is no other reason for compelling such duplication of effort.[35]

There is no sound reason for a per se rule that whenever the Department of Justice *can* duplicate grand jury materials through civil discovery it *must* do so, or forgo their use. Such a rule would frequently, as in this case, hamper the government's

[35] The Court in *Sells* did suggest that district courts may "take into account any alternative discovery tools available by statute or regulation to the agency seeking disclosure" (463 U.S. at 445). But the inclusion of this point in a list of possible considerations hardly suggests a per se rule that what can be duplicated must be duplicated.

efforts to enforce federal law in a consistent manner: if the Antitrust Division must recreate grand jury materials under the ACPA whenever it can do so, resources that should be spent elsewhere will be needlessly diverted, and in many cases, resource and time constraints will simply prevent effective civil enforcement of the law.[36] That result would serve no valid purpose, because it is in those situations where civil discovery is capable of fully duplicating the work of the grand jury that the reasons for nondisclosure are least compelling. It makes no sense to require the government to follow a roundabout method of obtaining the same information it could obtain directly under Rule 6(e). The *only* effect of denying the Antitrust Division a Rule 6(e) order in a case like the present is to burden the government with needless delay and expense or to foreclose legiti-

[36] The Civil Division, though expert in the False Claims Act, lacks the resources to investigate and prosecute all possible cases of fraud against the government and therefore must rely on other Divisions and Offices—suitably advised—for enforcement. It is particularly important, moreover, that the Antitrust Division be able to consult with the Civil Division regarding its enforcement practice under the False Claims Act, because the Antitrust Division intends to enforce that statute vigorously in cases where the federal government suffers a monetary loss as a result of an antitrust violation. See D. Ginsburg, *Antitrust Enforcement in the Second Term* 2-3 (Nov. 8, 1985) (unpublished manuscript 19th New England Antitrust Conference). At the same time, there is no reason to suppose that fostering such consultation will always result in the filing of additional False Claims Act suits. Indeed, it may often be in a private party's interest for the Civil Division to be able to offer its advice, precisely because the Civil Division is also in the best position to recommend when, for policy reasons, a False Claims Act claim should *not* be filed.

mate consultation and, in some cases, civil enforcement.

The court of appeals stated that its decision to vacate the Rule 6(e) order was "influenced" by the fact that the government's motion and the district court's order failed to specify the materials that would be disclosed (Pet. App. 10a-11a). That concern was misplaced. In the first place, the court of appeals failed to take account of the inherently limiting effect of the district court's requirement that any disclosure of grand jury materials be made solely for the consultative purposes specified in the government's request.[37] Since *nothing* could be disclosed to the Civil Division and the United States Attorney's Office for their *own* use, or could be used by the recipients for any purpose other than providing their advice to the Antitrust Division, there simply was no incentive to disclose more than the minimum necessary for that advice to be given.[38]

[37] The Antitrust Division's motion made clear that the materials sought to be disclosed would not be used by the Civil Division or the United States Attorney's Office for a "further investigation" (J.A. 13). The district court also specifically stated in its order that the Civil Division was required to treat "this information * * * as confidential" and to limit "its use * * * solely to the purposes" for which disclosure was requested and authorized (Pet. App. 23a). There is no claim that the Civil Division attorneys used this material for anything other than the limited consultative purpose authorized by the district court's order.

[38] The Antitrust Division's motion sought the authority to disclose only such internal memoranda and transcripts or exhibits as would set forth the Antitrust Division's view of the evidence and enable the Civil Division to give meaningful guidance on the application of the False Claims Act to the conduct at issue. That material, the court of appeals seemed

The court of appeals also overlooked the fact that the reason for the disclosure made impossible a complete advance specification of the items to be disclosed. The Antitrust Division sought to obtain the informed opinion of the Civil Division and the United States Attorney's office as to whether a False Claims Act suit would be consistent with federal enforcement policy. Neither the Antitrust Division nor the district court was in a position to decide, in advance, precisely what information would need to be disclosed for this purpose; that would necessarily be determined, in part, in the consultative process itself. Of course, the district court could have required the Antitrust Division to come repeatedly to court to identify each document or transcript that had to be disclosed; but that formality would have served little purpose except to increase the burden on the court and provide opportunities for delay. Accordingly, in light of the legitimate and limited purpose of this disclosure request, the scope of the district court's order was altogether appropriate.

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to acknowledge (Pet. App. 11a), would involve only a small portion of the grand jury materials. Indeed, out of a grand jury record consisting of approximately 250,000 pages of subpoenaed documents and testimony by dozens of witnesses (*id.* at 12a), the Antitrust Division actually disclosed to the Civil Division approximately 350 pages of memoranda and approximately 100 pages of documents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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